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IN THE

Supreme Court of the United States

October Term, 1957

No. 914

JOSEPH GERNIE and EDWARD OGULL,

Petitioners,

VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Joseph Gernie and Edward Ogull, respectfully pray for a rehearing of the order of this Court dated May 26, 1958, denying their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Basic Facts

Petitioners were convicted of violation of the narcotic laws and conspiracy. They were sentenced to prison terms of 10 years and five years respectively. The judgments of conviction were affirmed on February 13, 1958 (252 F. 2d 664). They duly applied for certiorari, which application was denied on May 26, 1958.

Argument

Petitioners assign the following reason for granting this petition:

I.

It has been consistently contended that the evidence fell far short of establishing a *prima facie* case of petitioner Gernie's complicity in any offense charged. The Government's brief in opposition to the original application attempted to justify his conviction (pp. 10-11) by referring to several aspects of the evidence. These items were: two conversations with Buzzeo, after which the latter was possessed of narcotics; Gernie's having on his person at the time of his arrest one of the marked bills an agent had given to Buzzeo 68 days previously; Gernie's being seen on one occasion with Mayer, his nephew, shortly after Mayer had met Harell and Jackson; and Gernie's placing in Mayer's car "a dark package," concerning whose contents no evidence was offered. The conclusion that the foregoing incidents were "quite ample to sustain the conviction" is utterly untenable. To say that individually or in the aggregate they are probative of anything is an arrant distortion of logic and common sense. Whatever was adduced in the attempt to implicate petitioner Gernie can merely be viewed as of slight, remote or conjectural significance. Indeed even this characterization accords to the events described a probative force of which they are quite devoid. No civil suit predicated upon Gernie's alleged ownership or possession of narcotics could fairly be maintained upon so flimsy a concatenation of circumstances, and *a fortiori* no criminal prosecution.

It is believed that the holding of the Court of Appeals herein is due in considerable measure to its attitude towards the quantum of proof required in criminal cases, which (erroneously, we contend) is regarded as being identical with what is essential in civil actions. The District Court

herein (R. 336-337) observed that "this Second Circuit does not subscribe to the opinion in some of the other circuits," and we indicated in our original petition that the differing circuits included the Third, Fifth, Eighth, Ninth, Tenth and the District of Columbia.

We now proceed to direct the Court's attention to several additional recent holdings casting doubt upon the decision herein, namely, *Guevara* v. *United States* (C. A. 5, 1957), 242 F. 2d 745 (requiring "inferences which excluded every reasonable hypothesis but that of guilt"); *Lattanzio* v. *United States* (C. A. 9, 1957), 243 F. 2d 801 (observing, at p. 803, that the Fifth Circuit "may apply a so-called 'special rule' as to review of cases involving circumstantial evidence on appeal"); and *Handford* v. *United States* (C. A. 5, 1958), 249 F. 2d 295. On the other hand, the Second Circuit quite recently, in *United States* v. *Moia* (C. A. 2, 1958), reiterated its disposition to adhere to the rule that jurors are not compelled to draw a conclusion of innocence where two inferences are possible from circumstantial evidence, predicating its holding on the authority of *Holland* v. *United States*, 348 U. S. 121, 99 L. Ed. 150. A reference to the latter opinion (p. 139) discloses no such rule, but merely an approval of the doctrine that circumstantial evidence need not exclude every reasonable hypothesis other than that of guilt.

The words of the late Judge Frank, in *United States* v. *Castro* (C. A. 2, 1956), on this very subject, to wit, the identity of degree of proof in criminal and civil cases, are still apposite:

> "If this court continues to apply its doctrine, I hope that, some day soon, the Supreme Court, because of the conflict in this area between this Circuit and some other Circuits, will decide what is the correct rule."

This Court has recently (March 31, 1958) indicated that its "duty as an appellate court is to assess the evidence as

a whole under the rigorous standards governing criminal trials." *Green* v. *United States,* 2 L. Ed. 2d 672; see also *Heikkinen* v. *United States,* 2 L. Ed. 2d 264.

Our arguments in this connection are substantial, and not previously fully developed especially in the light of the recent applicable authorities, so as to render rehearing eminently proper within the intendment of this Court's Rule 58.

II.

It is sumitted that the other points urged in support of the original petition herein are meritorious and were not refuted by the Government. Thus the failure to produce the paid informer and the exclusion of adequate cross-examination concerning him violated the rules laid down by this Court in *Roviaro* v. *United States,* 353 U. S. 53, 1 L. Ed. 2d 639, and *United States* v. *Reynolds,* 345 U. S. 1, 97 L. Ed. 727. Both of the latter holdings were reinforced by the decision in *Jencks* v. *United States,* 353 U. S. 657, 1 L. Ed. 1103.

Even with respect to the important evidence argument based upon the erroneous reception of proof that Gernie had in his possession a certain marked bill more than two months after an agent had given it to another person, the Government cited *Lee* v. *United States* (C. A. 9, 1957) 245 F. 2d 322, and urged that therein the Court held admissible proof that defendant possessed certain marked bills (used to buy narcotics) "immediately after such sale." Such proximity in point of time simply serves to strengthen petitioners' argument that a possession as remote as that herein disclosed was utterly inconsequential but evidence thereof was gravely prejudicial.

III.

The various points presented as justifying rehearing are not only matters of legal substance, but are also especially cogent in a case wherein there has been an unjust conviction of innocent individuals. The innocence of one rests upon his complete dissociation from the crimes charged at all stages of their alleged commission; that of the other upon a flagrant pattern of entrapment. If any want of judicial power to alleviate an unjust verdict stands as a bar to appellate review, surely the several errors presented by the record are a more than sufficient instrumentality for relief.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the order of this Court denying their petition for a writ of certiorari to the Court of Appeals for the Second Circuit be reheard and vacated and that the petition be granted.

Dated: New York, N. Y., June 19, 1958.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

Certificate of Counsel

The undersigned, JACOB W. FRIEDMAN, attorney for petitioners, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58 as amended, and that said petition for rehearing is not interposed for delay.

JACOB W. FRIEDMAN,
Attorney for Petitioners.